

**BOARD OF APPEALS CASE NO. 5313**

\*

**BEFORE THE**

**APPLICANT: Aumar Village, LLC**

\*

**ZONING HEARING EXAMINER**

**REQUEST: Special Exception to allow accessory  
parking and driveways to serve an adjacent B3 use;  
200 Mountain Road, Fallston**

\*

**OF HARFORD COUNTY**

\*

**Hearing Advertised**

\*

**Aegis: 11/20/02 & 11/27/02**

**Record: 11/22/02 & 11/29/02**

**HEARING DATE: January 6, 2003**

\*

\* \* \* \* \*

## **ZONING HEARING EXAMINER'S DECISION**

The Applicant, Aumar Village, LLC, is requesting a special exception, pursuant to Section 267-53K of the Harford County Code, to allow accessory parking area and driveways within the AG/Agricultural District to serve a use permitted and located on an adjacent B3/General Business District and not permitted in the AG/Agricultural District.

Harford County Code Section 267-53K provides as follows:

“Accessory parking areas, driveways and private roads. These uses may be granted in any district to serve a use permitted and located in another district but not permitted in the subject district, provided that:

- (1) The parking area, driveway or private road shall be accessory to and for the use of one (1) or more agricultural, residential, business or industrial uses located in an adjoining or nearby district.
- (2) No charge shall be made for the parking or storage of vehicles on any parking lot approved pursuant to this provision.
- (3) Any private road or driveway shall provide access to an approved private road, county road or state road or highway.
- (4) The number of parking spaces and total parking area approved in the subject district under this section shall not exceed thirty percent (30%) of the parking spaces and area required by this Part 1 for the permitted use.

## **Case No. 5313 – Aumar Village, LLC**

The subject parcel is located at 200 Mountain Road, Fallston, Maryland 21047 and is more particularly identified on Tax Map 55, Grid 3C, Parcel 76. The parcel consists of 47.827± acres and is entirely within the Third Election District. The parcel is split zoned consisting of AG/Agricultural, B3/General Business and R2/Urban Residential.

### **FINDINGS OF FACT**

A number of witnesses testified in this matter. For the Applicant testified Jeffrey Deegan a licensed professional engineer; Lee Cunningham, an expert land and transportation planner; and in rebuttal, Roger Mainster, an expert real estate appraiser. Mr. Anthony McClune testified on behalf of the Department of Planning and Zoning. For the Protestant's testified Jacqueline Seneschal, an expert land planner; Daniel Harris, a neighboring property owner residing at 2304 Mill Road, Fallston, Maryland.; Phillip Topper, a neighboring property owner residing at 2307 Edinborough Drive, Fallston, Maryland.

The facts are generally undisputed. The subject parcel is split zoned and contains 4.73 acres of B3/General Business property that fronts along U.S. Route 1. This area of the property has an existing building that was used in the past as an automobile repair facility. The parcel slopes away from U.S. Route 1 toward a large stand of trees. There is an existing stream and associated wetland area on the western portion of the B3 property. The two nearest residential uses are 600 feet away (across Route 1) and 900 feet away (north of the subject parcel on Route 152). Proposed is commercial development that would utilize the existing building and create two new buildings. Total commercial square footage resulting would be 20,000 square feet. Uses proposed include a mix of retail, service and office uses. Access to the property would be from a right-in, right-out only access along Mountain Road north of Route 1 and a second access point that is fully directional along Route 1, south of Mountain Road. The proposed project will require additional parking spaces which are intended to be located on an accessory lot placed on the AG/ zoned property adjacent to the B3 property and the new commercial structures. The Applicant claims that 134 total spaces will be required. 30 of the total number of spaces are intended to be located within the AG zone. Because of the existing stream, wetlands and associated buffer, 2 acres of the B3 property cannot be developed.

**CONCLUSION**

The Applicant, Aumar Village, LLC, is requesting a special exception, pursuant to Section 267-53K of the Harford County Code, to allow accessory parking area and driveways within the AG/Agricultural District to serve a use permitted and located on an adjacent B3/General Business District and not permitted in the AG/Agricultural District.

Section 267-51 of the Harford County Code provides as follows:

“Purpose.

Special exceptions may be permitted when determined to be compatible with the uses permitted as of right in the appropriate district by this Part 1. Special exceptions are subject to the regulations of this Article and other applicable provisions of this Part 1.”

Section 267-52 of the Harford County Code provides as follows:

“General regulations.

- A. Special exceptions require the approval of the Board in accordance with Section 267-9, Board of Appeals. The Board may impose such conditions, limitations and restrictions as necessary to preserve harmony with adjacent uses, the purposes of this Part 1 and the public health, safety and welfare.
- B. A special exception grant or approval shall be limited to the final site plan approved by the Board. Any substantial modification to the approved site plan shall require further Board approval.
- C. Extension of any use or activity permitted as a special exception shall require further Board approval.
- D. The Board may require a bond, irrevocable letter of credit or other appropriate guaranty as may be deemed necessary to assure satisfactory performance with regard to all or some of the conditions.
- E. In the event that the development or use is not commenced within three (3) years from date of final decision after all appeals have been exhausted, the approval for the special exception shall be void. In the event of delays, unforeseen at the time of application and approval, the Zoning Administrator shall have the authority to extend the approval for an additional twelve (12) months or any portion thereof.”

## **Case No. 5313 – Aumar Village, LLC**

The protesting neighbors that testified in this case generally were concerned that there were already too many commercial uses in existence in the Route 1 corridor. Both Mr. Harris and Mr. Topper expressed concerns of a “domino” effect of commercial uses spilling over into the AG Districts and any precedent that may, therefore be set by such an approval. Of course those fears ignore the fact that the Harford County Code allows such “spillover” as a special exception, a use presumed to be compatible with uses permitted as a matter of right in the AG zone unless there are special circumstances existing that would negate the presumption.

Turning to the specific requirements of the Harford County Code set forth in Section 267-53K, the Hearing Examiner concludes that the Applicant’s request meets or exceeds each and every requirement of the Code. The proposed use is accessory to the single commercial use located on an adjacent parcel; no charge is intended to be made for use of the parking on the AG parcel; access shall be provided to both Mountain Road and U.S. Route 1; the request is limited to 30% of the number of spaces allowed for the permitted use. In evaluating any special exception use, the Hearing Examiner is required to turn to the provisions of Section 267-9I of the Harford County Code.

- (1) The number of persons living or working in the immediate area.

*This area of the County is a mix of uses including commercial uses along Route 1, residential and farm uses along both Mountain Road and Route 1.*

- (2) Traffic conditions, including facilities for pedestrians, such as sidewalks and parking facilities, the access of vehicles to road; peak periods of traffic; and proposed roads, but only if construction of such roads will commence within the reasonably foreseeable future.

*The Applicant has proposed ingress and egress from two locations. The traffic expert that testified opined that this use would provide insignificant additional traffic along either Route 1 or Mountain Road.*

## **Case No. 5313 – Aumar Village, LLC**

- (3) The orderly growth of the neighborhood and community and the fiscal impact on the county.

*The proposal is a use that is permitted by way of special exception in the Agricultural District with Board approval. The use should not adversely impact the neighborhood. There is no reason to believe that should the use be approved, the proposal will have any adverse fiscal impacts on the County.*

- (4) The effect of odors, dust, gas, smoke, fumes, vibration, glare and noise upon the use of surrounding properties.

*The proposed use is a mix of retail, service and office uses that should have no associated impacts related to odors, dust, gas, smoke, fumes, vibration, glare or noise upon the use of surrounding properties.*

- (5) Facilities for police, fire protection, sewerage, water, trash and garbage collection and disposal and the ability of the County or persons to supply such services.

*Police protection will be provided by the County's local Sheriffs Department and the Maryland State Police. Fire protection will primarily be from the Fallston and Bel Air Voluntary Fire Departments. County water and sewer will be provided. A sediment control facility will be required to meet the standards of the Harford County Health Department and generally accepted engineering principles and practices. Trash collection will be handled by a private hauler.*

- (6) The degree to which the development is consistent with generally accepted engineering and planning principles and practices.

*The proposal is recognized by the Code as a use that is compatible with other uses in the Agricultural District, provided certain requirements can be met. And absent evidence rebutting the presumption of compatibility.*

- (7) The structures in the vicinity, such as schools, houses of worship, theaters, hospitals and similar places of public use.

*There are churches and schools in the overall community but no such structures or uses are located within the immediate vicinity of the proposed use.*

**Case No. 5313 – Aumar Village, LLC**

- (8) The purposes set forth in this Part 1, the Master Plan and related studies for land use, roads, parks, schools, sewers, water, population, recreation and the like.

*The proposed use is recognized as a use that can co-exist compatibly with other uses permitted in the Agricultural District.*

- (9) The environmental impact, the effect on sensitive natural features and opportunities for recreational and open space.

*The proposed use accounts for the natural features existing on the property that, in large part, contribute to the need for the subject request. Disturbance of natural features has been minimized by the proposed plan and, for the most part, is limited to areas of NRD buffer that have been disturbed in the past by prior users.*

- (10) The preservation of cultural and historic landmarks.

*Not applicable to the request.*

The Hearing Examiner finds that the Applicant can meet or exceed each and every specific statutory requirement of the Harford County Code. In addition to specific statutory requirements, Maryland Courts have had occasion to discuss the burden of proof that must be met by an applicant in a special exception case.

Under Maryland law, the special exception use is part of the comprehensive zoning plan sharing the presumption, that, as such, it is in the interest of the general welfare, and therefore, valid. The special exception use is a valid zoning mechanism that delegates to an administrative board a limited authority to allow enumerated uses which the legislature has determined to be permissible absent any fact or circumstance negating the presumption.

The duties given the Board are to judge whether the neighboring properties in the general neighborhood would be adversely affected and whether the use in a particular case is in harmony with the general purpose and intent of the plan. Schultz v. Pritts, 291 Md. 1, 432 A. 2d 1319, 1325 (1981) (“Schultz”).

## **Case No. 5313 – Aumar Village, LLC**

**“While the applicant in such a case has the burden of adducing testimony, which will show that, his use meets the prescribed standards and requirements of the zoning code, he does not have the burden of showing affirmatively that his proposed use accords with the general welfare. If he shows to the satisfaction of the Board that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely effect the public interest, he has met his burden. The extent of any harm or disturbance to the neighboring area and uses is, of course, material; but if there is not probative evidence of harm or disturbance in light of the nature of the zoning involved or of factors causing disharmony to the functioning of the comprehensive plan, a denial of an application for special exception is arbitrary, capricious, and illegal. Turner v. Hammond, 270 Md. 41, 54-55, 310 A. 2d 543, 550-551 (1973) (“Turner”).**

**The appropriate standard to be used in determining whether a requested special exception use should be denied is whether there are facts and circumstances that show the particular use proposed at the particular location proposed would have any adverse effect above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.” See Schultz at 432 A. 2d 1327.**

**Such facts and circumstances must be strong and substantial to overcome the presumption that the proposed use be allowed in the district. Anderson v. Sawyer, 23 Md. App. 612, 329 A. 2d 716, 724 (1974) (“Anderson”).**

**The law in Maryland is clear that the localized impact caused by a special exception must be unique and atypical in order to justify denial. Sharp v. Howard County Board of Appeals, 98 Md. App. 57, 632 A. 2d 248 (1993) (“Sharp”).**

**In determining whether the presence of the proposed uses would be more harmful here than if located elsewhere in the AG zone, one must take into account the area where the use is proposed. AT&T Wireless Services v. Mayor and City Council of Baltimore, 123 Md. App. 681, 720 A. 2d 925 (1998) (“AT&T”).**

**In Mossburg v. Montgomery County, 107 Md. App. 1, 666 A. 2d 1253 (1995) (“Mossburg”) the Court of Special Appeals had occasion to restate and clarify the law in Maryland regarding special exceptions. There the Court found that the Board of Appeals of Montgomery County improperly denied a special exception for a solid waste transfer station in an industrial zone.**

## **Case No. 5313 – Aumar Village, LLC**

In reversing the Circuit Court, which upheld the Board's decision, the Court of Special Appeals found that the decision to deny the special exception was not based on substantial evidence of adverse impact at the subject site greater than or above and beyond impact elsewhere in the zone and, therefore, the decision was arbitrary and illegal. There the Court said:

“The question in the case sub judice, therefore, is not whether a solid waste transfer station has adverse effects. It inherently has them. The question is also not whether the solid waste transfer station at issue here will have adverse effects at this proposed location. Certainly it will and those adverse effects are contemplated by the statute. The proper question is whether those adverse effects are above and beyond, i.e. greater here than they would generally be elsewhere within the areas of the County where they may be established, ... In other words, if it must be shown, as it must be, that the adverse effects at the particular site are greater or “above and beyond”, then it must be asked, greater than what? Above and beyond what? Once an applicant presents sufficient evidence establishing that his proposed use meets the requirements of the statute, even including that it has attached to it some inherent adverse impact, an otherwise silent record does not establish that that impact, however severe at a given location, is greater at that location than elsewhere.”(emphasis supplied)

Thus, the Court of Special Appeals emphasized that once the applicant shows that it meets the requirements for the special exception under statute, the burden then shifts to the Protestants to show that impacts from the use at a particular location are greater at this location than elsewhere. If the Protestants fail to meet that burden of proof, the requested special exception must be approved.

In the instant case the only real dispute is the number of additional parking spaces that may be required to be located within the AG zone. Based on the Applicant's determination, a total of 134 spaces is required for the office and service use with 30 of those located on the AG property. According to the Protestants, the use proposed is a shopping center that only requires 24 spaces to be located within the AG property. The Protestants argue that the Hearing Examiner needs to determine the nature of the use in order to allow the special exception. The Hearing Examiner disagrees.



## **Case No. 5313 – Aumar Village, LLC**

The statute does not limit the number of spaces allowed in the AG zone by limiting actual numbers but rather, allows 30% of the necessary spaces, whatever the required number for the permitted use may be, to be located on the adjacent AG property if all other factors are met. In this case the Applicant has met each and every statutory requirement of the Harford County Code and further, no evidence was produced by the Protestant's that would rebut the presumption given the special exception use or lead to the conclusion that this use at this location would have any impacts above and beyond those inherently associated with such a use regardless of its locations within the zone. In fact, this location provides even less impact than such a use at other locations because of the distances involved between the proposed use and the next nearest use by an owner other than the Applicant. The proposed use is surrounded by property all owned by the Applicant, unlike many similar uses found within the AG zone.

By limiting approval to the 30% level set forth in the statute, the actual number of spaces allowed will be directly related to the ultimate permitted use made of the B3 property. Moreover, any concerns that such numbers would exceed reasonable numbers can be accomplished by placing a ceiling on the number of spaces allowed. Such a limitation would require the Applicant to seek further approval in the future for any increase in the number of parking spaces used on the AG parcel.

For all of the foregoing reasons, the Hearing Examiner recommends approval of the request for special exception pursuant to Harford County Code Section 267-53K subject to the following conditions.

1. That the Applicant submit a site plan for review and approval through the Development Advisory Committee (DAC).
2. That the number of spaces permitted on the AG parcel shall be limited to 30% of the total number required for the permitted use on the B3 property but shall not exceed 34 spaces.
3. That disturbance to natural features on the parcel be minimized or avoided.
4. That all setback and buffer requirements be met by the Applicant.

Date MARCH 3, 2003

William F. Casey

